No. 14,995

IN THE

United States Court of Appeals

For the Ninth Circuit

MASAO HIRASUNA, doing business as Mike's Auto Top Shop & Upholstery Shop,

Appellant,

vs.

S. V. McKENNEY, District Director of Internal Revenue,

Appellee.

Upon Appeal from the United States District Court for the District of Hawaii.

OPENING BRIEF FOR MASAO HIRASUNA, APPELLANT.

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JURISDICTIONAL STATEMENT.

This is a civil action, filed in the court below under 28 U.S.C.A. Sec. 1340, for the return of $1,391.92 (Tr. p. 48) of Federal excise taxes paid on May 30, 1953 by the appellant (Tr. p. 48), a citizen and resident of the Territory of Hawaii (Tr. p. 44). The defendant, appellee, was the District Director of Internal Revenue of the United States of America covering the Hawaii District beginning in November 1952.

He was the District Director on May 30, 1953 when appellant paid his tax and on May 2, 1955 when this suit was filed in the court below. (Tr. p. 50.)

On October 27th, 1954 appellant duly filed his claim for refund with defendant, appellee (Tr. p. 50) and on April 22, 1954 appellee denied said claim of appellant (Tr. p. 33). Appellant promptly on May 2, 1955 filed this suit in the court below. (Tr. p. 17.) Appellee answered (Tr. p. 32) and a trial was held beginning October 14, 1955. (Tr. p. 65.) A decision was entered against appellant (Tr. pp. 50-60) on December 1, 1955 and on December 8, 1955 a judgment was entered in favor of appellee (Tr. p. 60).

Appellant appealed from said decision and judgment by filing his appeal and notice of appeal on December 21, 1955. (Tr. p. 62.)

The United States Circuit Court of Appeals for the Ninth Judicial Circuit has jurisdiction upon appeal to review the judgment entered below by virtue of the provisions of the judicial code as amended, 28 U.S.C.A. 1294.

STATEMENT OF THE CASE.

The stipulated facts (Tr. pp. 43-50) are that appellant is and was, at all times material herein, a citizen and resident of the Territory of Hawaii. Appellee is and was at all times material herein, a citizen and resident of the Territory of Hawaii and he was the sole District Director of Internal Revenue of the

United States Government covering the Hawaii District during the years 1953, 1954 and the year 1955 up to September 1st, 1955; as such he had full power and authority to collect the taxes in dispute herein. (Tr. p. 49.) Appellant at all times material herein, operated a business under the name and style "Mike's Auto Top and Upholstery Shop" at 1714 Kapiolani Boulevard, Honolulu, Territory of Hawaii and that in early 1953 the Appellee through his agents made assessment against appellant in the total sum of $1,766.70 for excise taxes due as alleged manufacturer of auto parts under Section 3403 of the Internal Revenue Code of 1939. That the assessment covered (Tr. pp. 45-47) the years 1949, 1950, 1951, 1952 and 1953 (up to September). That of the $1,766.70 appellant stipulated that $374.78 was properly assessed, leaving $1,391.92 in dispute in this case. The amount of $1,391.92 was stipulated to "consist of amounts assessed against sales to used car dealers of custom made seat covers only". (Tr. p. 48.)

It was further stipulated that appellant paid said assessment on May 30, 1953 (Tr. p. 48) and that on October 27, 1954, appellant regularly filed with appellee four claims for refund for each of the periods above mentioned. Appellee in his answer admits (Tr. p. 33, par. 6) that claims in the form attached to the appellant's complaint (Tr. pp. 7-13) were filed for the respective years and in the respective amounts and that on or about April 22, 1955 said claims were denied by letter of appellee, a copy of which was attached to the complaint. (Tr. p. 7, par. 7.)

The stipulation further provided that no part of the $1,391.92 "was collected by appellant from his customers at any time". (Tr. p. 48, par. 7.)

At the trial below the appellee did not present any witnesses. The only witnesses were appellant's witnesses, Shigeo Yatagai, Clyde Lee and appellant himself. The evidence adduced by appellant was uncontradicted. Therefore a summary of the testimony is hereby submitted for this statement of the case.

Appellant, Masao Hirasuna testified that he is forty years of age and is the sole proprietor of "Mike's Auto Top and Upholstery Shop" situated at 1714 Kapiolani Boulevard, Honolulu. (Tr. pp. 87-88.) His shop is situated within "Steve's Used Car Lot" in a building about 50 feet by 100 feet which contains, besides appellant's shop, an auto glass shop and an auto paint shop. He occupies a space about 20 feet by 50 feet in said building. The glass and paint shop are not appellant's. He has one employee and he himself does work with the employee. (Tr. pp. 88-89.) His equipment consisted of a sewing machine, scissors, knives, pliers, wrenches, hammers, screwdrivers, rules, yardsticks and other hand tools. (Plf's Ex. I) (Tr. p. 91.) For supplies he usually had in stock about 15 to 20 rolls of woven plastic cloth, leatherette, facing cloth, head lining cloth, wadding, springs, air foam rubber and other minor articles. (Plf's Ex. H) (Tr. p. 90). Besides upholstering he recovered auto tops, did auto ceiling, head lining, and auto door paneling. (Tr. p. 92.) By upholstering he meant general upholstering of the complete inside of a car. (Tr.

p. 92.) Besides appellant's shop there were about a dozen other similar upholstery shops in Honolulu. (Tr. p. 106.)

Appellant further testified that within a circle of half mile from his place of business there were about a dozen used car dealers and about 99% or just about all of his business came from used car dealers. (Tr. p. 93.) The business of upholstering was obtained by telephone calls from the dealers, the dealer describing the pattern, color or combination. The cars to be repaired were delivered to appellant's place of business by the dealer or in some cases appellant called for the cars. (Tr. p. 93.) In some instances appellant took the samples down for the dealer's choice. (Tr. p. 94.) Appellant did from two to five cars a day depending on the type of material, trim work and design. (Tr. p. 109.)

The sitting portion of the front and back seats was referred to as the "cushion" and the portion of the seats where the person leans back was referred to as the "lazy back". (Tr. p. 94.) The procedure generally was that the cushions were taken out and measured. The cloth was then cut to an approximate length and laid on top of the cushion. The cloth is then pinned after pulling tight as possible and marked with chalk. The facing cloth is also then pinned on and chalked. The cloth is then taken off and cut, piping sewed and the cut portions are sewn together. (Tr. pp. 94-95.) The sewing for one cushion takes from 10 to 15 minutes. (Tr. p. 112.) Then the seat is vacuum cleaned, and springs replaced, if any are

broken, and all the corners are wadded with thin cotton and the covers installed with tacks or hog rings, which were described as half moon rings of about one-half inch radius gripped on with a special tool. (Tr. pp. 95-96.)

There was considerable testimony by appellant regarding the repair of the "lazy back" because various makes of cars had different types. On General Motors' cars the front seat "lazy backs" have a steel shell on the back and said shells are removable. The "lazy backs" also come off the car. The "lazy back" is then upholstered in the same process as above described for the cushions. (Tr. pp. 97-98.) The shell is not covered unless the customer requests and if covered it is a separate cover from the cushion and lazy back cover. (Tr. p. 99.) For cars which do not have shell back buckets covers are made to cover the lazy backs. Bucket type covers are entirely different from those made where there is a steel shell. (Tr. p. 103.) General Motors' cars constituted about 65% of his business. Chrysler make cars and Kaiser cars up to 1952 were made like General Motors' in that the shell and lazy backs had to be separately covered. (Tr. p. 128.)

As for the back seat, appellant testified, the process of covering the "lazy back" becomes complicated in cases where there is a movable arm rest in the center of the "lazy back". The lazy back then is removable in 3 sections, lazy back, big arm rest and lazy back. There are three covers made to fit the three sections in such cases. (Tr. p. 100.)

Appellant testified that by the use of various types of cloth various designs may be made. Plaintiff's Exhibit J shows the various designs. The customer chooses the design (Tr. p. 101) and there are hundreds of other designs which could be made. (Tr. p. 117.) With relation to the ways the cloth are cut some standard designs were shown on Plaintiff's Exhibit K. The designs are used in accordance with customer requests or in certain cases a certain design must be used to take out the "wrinkles". The cushions and "lazy backs" are expertly cut to fit the particular cushion or "lazy back" and it takes an experienced and skilled person to put the sewn material on the cushion or lazy back. (Tr. p. 121.) There are a "lot of tricks and know-how involved in it". The sewn together material is not usable for any other car than that which it was cut and sewn for. (Tr. p. 121.) Each cushion varies, for example when a 250 pound man uses the cushion it really is a "different size altogether". Appellant further testified that he has been connected with the automobile business in some way since 1935 and he has never seen types of seat covers he installed in cars, sold in the market as auto parts. They couldn't be sold because his covers are "really sloppy, you just can't make head or tails on them, because you just got to know how to install it". (Tr. p. 124.) But in comparison, the ready made covers sold on the market have "a rope or grommet tacked on the facing cloth which you could tie it with a rope, you know, and they have springs that you could hook

it onto the cushion and . . . they usually use pins on it, on the back of the covers". (Tr. pp. 124 and 125.) Furthermore ready made seat covers are all of the pocket type and they are held down between the cushion and the lazy back by means of a simple round cardboard about one inch in diameter, six inches long which is tucked in between the lazy back and the cushion. (Tr. p. 123.) Appellant's covers do not have such cardboard devices. (Tr. p. 129.)

Of the cars handled by the Appellant he testified that about 85% have non-factory covers on when they are brought in (Tr. p. 96) and occasionally there are 2 non-factory covers on. (Tr. p. 113.) These covers are removed before the appellant starts upholstering. (Tr. p. 96.) The factory covers are not removed because the cotton will become separated from the frame. (Tr. p. 114.) And most of these factory covers are worn out. In most cases the cotton padding could be seen because of the worn out condition. (Tr. pp. 125-126.)

Appellant never made seat covers to be held in stock. (Tr. p. 108.) All of the seat covers installed by the appellant, on which the excise taxes were imposed by appellee, were made after the cars were brought and never ahead of time. (Tr. p. 108.)

The prices appellant charged car dealers were $18.00 for fibre, $28.00 for plastic and $35.00 for leatherette. Said prices included all labor cost and material cost. (Tr. p. 104.) The covering of the shell was included in the said prices in many instances. (Tr. p. 110.) The

labor cost is for all labor including labor for removal of seat parts, fitting, cutting, sewing and installation labor. The job of taking the seat parts out of the car was described as hard job. (Tr. pp. 122, 123.) Of the prices above quoted about 2/3 was for cost of material and 1/3 was for labor. (Tr. p. 122.)

Shigeo Yatagai testified that he represented in Hawaii a Los Angeles firm, Bolt and Lindsay, distributor of upholstery materials. He sold to appellant the upholstery materials listed in Plaintiff's Exhibit H above mentioned. (Tr. pp. 67-68.) These articles were not excise tax paid articles. (Tr. p. 69.) The materials sold appellant were not materials exclusively for automobile upholstery, they were used by others for furniture upholstery. (Tr. p. 70.)

Clyde Lee, an Internal Revenue Agent for Internal Revenue Service testified that he was since 1946 employed in the Audit Department in Hawaii. (Tr. p. 71.) He differentiated public rulings and private rulings. That private rulings are occasionally available to the members of the Internal Revenue Staff. (Tr. p. 73.) The Hawaii office received copies of private rulings originating from taxpayers within Hawaii. (Tr. p. 76.) If a private ruling relates to a taxpayer outside of Hawaii, the Hawaii office may or may not have copies of it. (Tr. p. 76.) Plaintiff's Exhibit A, a public ruling, dated August 18th, 1952 relating to manufacturers of auto seat covers was shown the witness. He testified that he did not know what the prior rulings referred to in said exhibit were. (Tr. p. 78.)

He made a search of his office for the said prior rulings but didn't find any. (Tr. p. 84.) He was the tax official who made appellant's assessment. (Tr. p. 86.) He made several other similar assessments of similar nature in 1953 (Tr. p. 85) and there were many others of similar nature made. (Tr. p. 85.)

Appellant testified that he first discovered that the taxes in question may be due just a few months before August 1952. (Tr. p. 106.) He thought that it was in June, 1952. Prior to said time he didn't know about it. (Tr. p. 106.) In the latter part of 1952 about a dozen people operating automobile upholstery shops organized an association because of this excise tax. (Tr. p. 107.) Appellant did not for the respective years file an excise tax return for the assessed taxes (Tr. p. 48, par. 7) for the respective assessments. The assessments were not additional assessments because no prior return had been filed by appellant for the respective years. (Tr. p. 48, par. 7.)

On the foregoing evidence the trial court rendered its decision and judgment against appellant. (Tr. pp. 51 and 61.) Appellant appealed to this court. (Tr. p. 62.)

QUESTIONS PRESENTED.

This case on appeal involves the construction of Section 3403(c) of the Internal Revenue Code of 1939, as amended. It reads:

> "Section 3403. Tax on automobiles, etc.
>
> "There shall be imposed upon the following articles sold by the *manufacturer,* producer, or

importer, a tax equivalent to the following percentages of the price for which so sold:

"(c) *Parts or accessories* . . . for any of the articles enumerated in subsection (a) or (b) . . ." 26 U.S.C.A. 3403(c) (emphasis supplied).

The Treasury regulations provide that "The term 'manufacturer' includes 'producer' and 'importer'." 26 C.F.R. 316.1(b).

The questions presented are: (1) Whether appellant herein was a "manufacturer" and (2) Whether the sale of seat covers by said appellant was a sale of "parts or accessories."

SPECIFICATION OF ERRORS.

The District Court erred in entering the Judgment dated the 8th day of December, 1955, and the Memorandum Opinion of the 1st day of December, 1955. The reasons are as follows:

1. The finding of the District Court that appellant was a manufacturer under Section 3403 of the Internal Revenue Code of 1939, as amended, is contrary to the published rulings of the Bureau which were in effect during the respective tax periods.

2. The District Court, in basing its decision on an unpublished ruling, erred in that said unpublished ruling was not introduced in evidence by the appellee and unpublished rulings are not matters of which a court takes judicial notice.

3. The finding of the District Court that appellant was a manufacturer is contrary to case authority and

to the evidence produced, which shows that appellant's upholstering jobs constituted repair and/or reconditioning.

4. The District Court erred in including installation charges in determining the basis of the tax contrary to 26 C.F.R. 316.8(a), requiring such charges to be excluded.

5. The District Court erred in finding that the seat covers were "accessories" against the dictate of 26 C.F.R. 316.55(b), which provides that an article, before it can be denominated as a part or accessory, must be "commonly or commercially known" as such.

6. The District Court erred in completely overlooking the distinction drawn in the cases and regulations between contracts of sale and contracts for labor and materials.

7. The District Court erred in completely disregarding the fundamental rule that where taxing statutes are ambiguous, such ambiguity must be construed against the taxing authorities and in favor of the taxpayer.

SUMMARY OF ARGUMENT.

1. The fundamental rules of construction must be kept in mind in applying the statute in question, for these rules are guides in the construction of revenue statutes.

2. The published rulings of the Bureau in effect during the respective tax periods inevitably leads one

to conclude that sales of seat covers specially made for the customer, regardless of whether said customer is an individual automobile owner or is a new or used car dealer, are not subject to tax. Such administrative construction, long established and uniformly and consistently adhered to, although not binding on the courts, is persuasive and entitled to high respect.

There was no evidence to establish the existence, number, contents and time of issuance of the unpublished rulings, which are not matters of which a court takes judicial notice. The court, therefore, erred in relying on said unpublished rulings for its decision.

The published ruling of August 18, 1952, is of no retroactive effect.

3. The finding of the District Court that appellant was a manufacturer is unsupported by case authority. To the contrary, case authority supports the contention that appellant was a repairer and not a manufacturer. It appears that the court has misinterpreted the cases and has based its decision on cases distinguishable from the case at bar on the facts.

4. 26 C.F.R. 316.8(a) requires that installation charges be excluded from the sale price in determining the basis of the tax. The District Court failed to comply with this provision.

5. Before an article can be denominated a "part or accessory," it must be a product "commonly or commercially known" as a part or accessory. 26 C.F.R. 316.55. It is contended, on the basis of the facts as adduced from appellant's undisputed testimony, that the seat covers in the case at bar were

not products "commonly or commercially known" as parts or accessories.

6. The great weight of authority, at common law and under the Uniform Sales Act, holds that, as a matter of law, contracts for labor and materials are not contracts of sale. Two District Courts have applied the distinction to the revenue statute here in question and have held that said statute, by taxing contracts of sale only, does not have within its purview contracts for labor and materials. This view appears to be supported by the Treasury regulations. State courts have also applied the distinction to state revenue statutes.

That the sales of seat covers in the case at bar were sales of labor and materials, is supported by the District Court decisions and other case authority.

7. The writer therefore submits, in view of the cases, regulations, and published rulings, that appellant was not a "manufacturer" and did not sell "parts or accessories" within the intendment of the statute. However, if, for some reason, all prior arguments are rejected by this Court, it is contended that this court must still find for appellant on the basis of the fundamental rule that all doubts must be resolved in favor of the taxpayer.

ARGUMENT.

I.

CONSTRUCTION OF REVENUE STATUTES.

It is of primary importance in this case to keep in mind a few fundamental principles courts have always referred to in construing tax statutes. These principles are tools with which legal minds work; but like a mechanic who attempts to do a job without tools and fails, a legal mind which operates without the constant reference to or reminder of the tools of thought which even jurists on the Supreme Court have used to guide them, may fall in error.

First of all, *"It is elementary that tax laws are to be interpreted liberally in favor of taxpayers, and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers."* (Emphasis supplied.) *Miller v. Standard Nut Margarine Co. of Florida,* 284 U.S. 498, 508, 52 S.Ct. 260, 263. See also: *Gould v. Gould,* 245 U.S. 151, 153, 38 S.Ct. 245; *U. S. v. Merriam,* 263 U.S. 179, 187 44 S.Ct. 69; *Bowers v. N. Y. & Albany Co.,* 273 U.S. 346, 350, 47 S. Ct. 389. Certainly when two District Courts, as will be shown later, concurred with appellant's views in this matter, laying emphasis on the foregoing rule, it cannot be said that the situation is without doubt and the rule does not apply. The trial court in this case in its opinion (Tr. pp. 50-60) did not even mention the above rule anywhere in its decision.

Another fundamental and just rule is that *"Taxation is an intensely practical matter and laws in*

respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences.'' Farmers Loan Co. v. Minnesota, 280 U.S. 204, 212, 50 S.Ct. 98, 100. (Emphasis supplied.) See also: *First National Bank v. Maine,* 284 U.S. 312, 325, 52 S.Ct. 176; *St. Louis Union Trust Co. v. Burnet* (C.C.A. 8, 1932), 59 F.2d 922, 927; *Buhl v. Kavanaugh,* (C.C.A. 6, 1941), 118 F.2d 315, 323; *City Bank Farmers' Trust Co. v.* U. S. (D.C. N.Y. 1934), 5 F.Supp. 871, 874.

The writer believes that these two fundamental rules should constantly be kept in mind in the consideration of this case and be used as guides where there is doubt as to which argument is more acceptable.

II.

EFFECT OF PUBLIC RULING OF AUGUST 18, 1952 AND PRIOR PUBLIC RULINGS.

It must be kept in mind that the assessment in this case covered the period January 1, 1949 to August 31, 1952. In other words it covered a period prior to the issuance of the following public ruling (Plaintiff's Exhibit A) made on August 18, 1952:

> ''Regulations 46 (1940), Section 316.55: Definitions of parts or accessories.
>
> Application of the tax, imposed by section 3403(c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to individual design and measurement.

Section 3403(c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 per cent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsections (a) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has *issued rulings* heretofore that the only circumstances under which the tax does not apply to sale of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, *that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attached to the manufacturer's sale thereof.*

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons. The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measure-

ments, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.

Because of the past rulings of the Bureau concerning the non-application of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443(d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale." (Emphasis supplied.)

The foregoing public ruling being published on August 18, 1952, the appellant did not have actual notice thereof prior to its publication.

It is of utmost importance that prior to August 18, 1952, all of the public rulings then in effect would have led any taxpayer in the appellant's position to believe that the transactions assessed as taxable by

appellee were not taxable. To start with, Plaintiff's Exhibit "B", a public ruling read as follows:

> "Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,571.
>
> Taxability of sale or use of parts or accessories measured and cut from raw or bulk material.—* * * A jobber or dealer frequently buys material, not subject to tax, and *by cutting or processing the material to the required length or size produces a part or accessory. In deciding whether the transaction is taxable, the Bureau has drawn a distinction between an immediate repair job and a sale for future use. If the part or accessory is cut or produced from lengths of rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax.* If, however, the jobber or dealer transforms lengths or rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles within the meaning of the Act, and his subsequent sale or use thereof is taxable under section 606(c) of the Revenue Act of 1932. (S.T. 824, CB. Dec. 1935, p. 368.)" (Emphasis ours.)

Would any taxpayer in appellant's position take a position contrary to what the appellant did, in view of the above? Any reasonable person in appellant's position would have been led to believe that the very words of the above public ruling made the transaction nontaxable.

In addition to the foregoing, Plaintiff's Exhibit "C", another public ruling, certainly was in appellant's favor. It read as follows:

> "Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,592.
>
> Repairs held not subject to tax.—Repairs on automobiles performed in a repair shop, such as painting, *upholstering,* changes in, or replacements of woodwork, and repairs to fenders and bodies are deemed to be in the nature of general repair work, rather than articles sold, and are not subject to tax under section 606 of the Revenue Act of 1932. (S.T. 582, C.C. Dec. 1932, p. 472.)" (Emphasis ours.)

It is customary for one interpreting tax laws, to look into similar situations. With relation to the installation of auto glass, a public ruling (Plaintiff's Exhibit "D") provided as follows:

> "Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,583.
>
> S.T. 928, above, holds that sales of glass cut to automobile patterns are subject to tax under Sec. 3403(c), IRC, except where, in connection with an immediate repair job, the glass is cut to pattern pursuant to a customer's order and is installed by the person who cut the glass. The term 'customer' as used in S.T. 928 applies to any patron of the glass dealer, *without any distinction as between consumers or individual owners and dealers or others enagaged in business.* Accordingly, where upon order of his customer, a glass dealer both cuts and installs replacement glass in an automobile under immediate repair,

> no excise tax liability attaches, *irrespective of the character of the customer for whom the services are performed.* However, where a glass dealer cuts replacement glass and sells it to another person for installation, excise tax liability attaches to such sale. S.T. 940, CB 1951-2, p. 214." (Emphasis supplied.)

It not only shows that a glass cutter who installs it in a car is not a manufacturer but the fact of the customer's status, whether a dealer or an ultimate consumer, would not make any difference. In the present case 99% of the plaintiff's customers were used car dealers. (Tr. p. 118.) But under the foregoing, public ruling, the status of the customer didn't make any difference. Wouldn't any reasonable person reading the above be led to believe that the customer status was immaterial?

See also Plaintiff's Exhibit "E" which public ruling read as follows:

> "The tax also attaches to rebabbited connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, where these articles are reconditioned in connection with an immediate repair job, the tax does not attach. S.T. 573 C.B. Dec. 1932, page 473."

The above mentioned public rulings, all interpreting the same section 3403 of the Internal Revenue Code of 1939 as applied to auto parts were all of the public rulings appellant could have resorted to on this subject prior to August 18, 1952. They clearly indicated

that appellant did not have to pay taxes on the transactions upon which appellee assessed taxes. In the trial of this cause, appellee wasn't able to point to a single public ruling which indicated otherwise.

These public rulings abovementioned (Plaintiff's Exhibits B, C, D and E) were long established and uniformly and consistently adhered to. Appellee did not at any time in the trial court show that it was otherwise. Such public rulings, although not binding on the courts, are persuasive and entitled to high respect and should not be lightly set aside except for very cogent reasons. *Farmer's Cooperative Co. v. Birmingham* (D.C. Iowa 1949), 86 F.Supp. 201, 229; *Greer v. Birmingham* (D.C. Iowa 1950), 88 F.Supp. 189, 221; *C.I.R. v. Swift & Co. E.B.A.* (CCA 7, 1945), 151 F.2d 625, 629; *Estate of Sanford v. C.I.R.,* 308 U.S. 39, 52, 60 S.Ct. 60. It is seldom that a tax litigant advances a public ruling and cites it in his favor. But in the present case because of the circumstances prior to August 18, 1952, said rulings are in appellant's favor. It is submitted that the government shouldn't be allowed to say that the rule isn't applicable when the shoe is on the other foot.

It was not only the public rulings made by the government itself which misled the appellant but there was a judicial decision unappealed by the government which clearly held that what appellant did was not manufacturing but a bare sale of labor and materials. A Federal District Court in Connecticut in 1926 decided in the case of *John J. Roche Co. v. Eaton,* 14 F.2d 857, 858 as follows:

"The plaintiff is a Connecticut corporation, having its place of business in Hartford. During the period in question it did a general automobile repairing business, and fitted, among other things it made, automobile side curtains, tops, slip covers, and carpets to the special order of its patrons. It carried no stock of manufactured articles with which to supply its customers, but made all materials up specially for each job as it was presented, to suit the whims and orders of each particular customer. It also repainted motor cars and reupholstered them. It repaired automobile bodies and fenders. It cut and fitted all the new material supplied from a stock of material on hand, for each customer, and it supplied all the new material that was used in the work of replacement or repair.

The tax was assessed on the price received by the plaintiff for the various articles above enumerated and supplied by the plaintiff to its patrons from 1921-1923, on the theory that the plaintiff was a manufacturer or producer of parts or accessories of automobiles, who sold the same.

It will not be questioned that a distinction exists between a contract of sale and one for work and materials. The distinction is not recent. It was recognized long anterior to the passage of the act of 1919. I will not assume that Congress was ignorant of its existence, and that, in the use of language having definite and ascertained legal connotations, it intended to disregard them. The motion or theory that, because the statute applicable is a taxing statute, its language was destined for lay persual and devised for a lay interpretation, is a trifle overingenious. The law

emanating from Congress is always addressed to all the people. Rules of statutory construction do not vary in accordance with the assumed learning or intelligence of the class which in any given instance is specially affected by the legislation.

I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction. While the line of demarcation between a contract of sale and one for services and material is often elusive, that is not a consideration which impugns the validity or the reality of the distinction.

I therefore hold that the parts or accessories (assuming that they are such) were not sold by the plaintiff within the intendment of the statute, and the excise tax levied and collected should be remitted. If I had any doubt as to the interpretation to be given to the statute, then under well-settled rules of construction I would be compelled to resolve that doubt in favor of the taxpayer."

The above decision was unappealed, and remained in the books as the leading case on this subject. From 1926 to the date of this brief no other decision (except that sought to be reviewed herein) has reversed the logical decision of the Federal District Court of Connecticut.

When public rulings are supplemented by court decisions, the Supreme Court of the United States, stated in *Estate of Sanford v. C.I.R.,* 308 U.S. 39, 52, 60 S.Ct. 60 as follows:

> "Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is *not so inconsistent with applicable decisions of the courts* as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it."

The public ruling of August 18, 1952, aforequoted, refers to prior rulings but said rulings were private rulings. What the said private rulings were, are still a mystery in this case in that in the court below evidence of said ruling was unavailable in the Hawaii office of Internal Revenue. (Tr. pp. 78, 84.) Appellee did not even make an effort to obtain it. Witness Clyde Lee, an Internal Revenue agent in Hawaii since 1946 didn't know that there was such a private ruling until he saw the public ruling of August 18, 1952. (Tr. p. 78.) At the time he testified in the trial court even he had never seen the private ruling.

The sudden move by the Hawaii office to make back assessments on these small businessmen like ap-

pellant after August 18, 1952 (Tr. p. 85) is further evidence of the fact that even internal revenue men in Hawaii didn't know about said private rulings prior to August 18, 1952. This court nor the lower court takes judicial notice of private rulings. This is elementary. See 31 C.J.S. Sec. 39, page 601.

It must be remembered that we are not here dealing with a net income tax. The tax herein discussed is one in the usual course of trade, if known by taxpayer, collected from the customer. It was stipulated in this case, that appellant did not collect such taxes from his customers during the period involved. (Tr. p. 48.) Furthermore, the tax imposed was an 8% tax, a tax high enough to absorb all of one's profit under present day competitive situations.

The practical effect of the government's actions up to August 18, 1952 was to say to these small businessmen, by these public rulings (Plaintiff's Exhibit B, C, D and E hereinabove referred to and quoted) you need not collect these taxes from customers. Said businessmen were further assured by the court decision in *John J. Roche Co. v. Eaton,* supra, unappealed by the government in 1926. The statutes, section 3403 of the 1939 Internal Revenue Code, interpreted by these public rulings and the decision certainly left no area of doubt. But in August of 1952, the government reversed its position and in effect made the prior secret private ruling retroactive by reciting them in a public ruling. The practical effect on these small businessmen was to force them to pay the tax they could have collected from customers, had they not been misled, out of their own pockets.

A more unjust and oppressive situation could seldom be found in our taxing history. It is submitted that "Taxation is an intensely practical matter and laws in respect of it should be construed and applied *with a view of avoiding, so far as possible, unjust and oppressive consequences.*" *Farmer's Loan Co. v. Minnesota,* 280 U.S. 204, 212, 50 S.Ct. 98, 100 (supra); *First National Bank v. Maine,* 284 U.S. 312, 325, 52 S.Ct. 176; *St. Louis Union Trust Co. v. Burnet* (C.C.A. 8, 1932), 59 F.2d 922, 927; *Buhl v. Kavanaugh* (C.C.A. 6, 1941), 118 F.2d 315, 323; *City Bank Farmers' Trust Co. v. U. S.* (D.C. N.Y. 1934), 5 F.Supp. 871, 874.

In closing this argument appellant wishes to point out that the public ruling of August 18, 1952 does not have the force and effect of Treasury regulations. See 5 U.S.C.A. Sec. 1002; *Hotch v. U. S.* (C.C.A. 9, 1954), 212 F.2d 280, 282-3; *U. S. v. Morelock* (D.C. Md. 1954), 124 F.Supp. 932, 944, 26 U.S.C.A. Sec. 3450; *Helvering v. N.Y. Trust Co.,* 292 U.S. 455, 468, 54 S.Ct. 806, 810; *Biddle v. Commissioner,* 302 U. S. 573, 582, 58 S.Ct. 379, 383; *Cahn v. C.I.R.* (C.C.A. 9, 1937), 92 F.2d 674, 676; "Cautionary Notice" to Internal Revenue Bulletin, August 18, 1952, No. 17. Moreover, it is not entitled to any respect and has no persuasive force whatsoever. It is well settled that a court will not follow an administrative construction of revenue statutes where it has not been adhered to uinformly and consistently. *Alexander v. Cosden Pipe Line Co.,* 290 U.S. 484, 498, 54 S.Ct. 292; *Burnet v. Chicago Portrait Co.,* 285 U.S. 1, 16, 52 S.Ct. 275; *Miller v. Standard Nut Margarine Co.,* 284 U.S.

498, 507-8, 52 S.Ct. 260; *Iselin v. U.S.*, 270 U.S. 245, 251, 46 S.Ct. 248. Said ruling, not having even prospective application as a regulation cannot be of retroactive application.

It is submitted that the lower court's decision and judgment should be reversed on this argument only.

III.

THE POSITION OF THE TRIAL COURT IS UNSUPPORTED BY AUTHORITIES.

The opinion of the lower court as to the meaning of the term "manufacturer" is manifestly unsupported by case authority. It is therefore the purpose of the writer at this point to analyze the decision of the lower court and compare it with the authorities. The Memorandum Opinion of the learned Judge below is hereby referred to.

The trial court held as follows:

> "The ordinary meaning of manufacture includes any process with a resulting product, aside from natural products, so long as the hand of man was instrumental in bringing it about. This is manufacture in its broadest sense. Under the regulations the definition of manufacture is no less broad: 'The term "manufacture" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.' 26 C.F.R. sec. 316.4(a). Granting that the word

manufacture so defined is very broad, we see no reason why this broad definition should not control. See: United States v. Armature Exchange, 116 F.2d 969 (9 Cir. 1941), reversing Armature Exchange v. United States, 28 F.Supp. 10 (Cal. 1939); United States v. Leslie Morris Co., 124 F.2d 371 (9 Cir. 1941); United States v. Moroloy Bearing Service, 124 F.2d 373 (9 Cir. 1941); Henricksen v. Seward, 135 F.2d 986 (9 Cir. 1943), holding that Con-Rod Exchange, Inc. v. Henricksen, 28 F. Supp. 924 (Wash. 1939) is not law; Clawson & Bals, Inc. v. Harrison, 108 F.2d 991 (7 Cir. 1939); United States v. Armature Rewinding Co., 124 F.2d 589 (8 Cir. 1942); Monteith Bros. Co. v. United States, 142 F.2d 139 (7 Cir. 1944); Clawson & Bals v. United States, 182 F.2d 402 (7 Cir. 1950). Applying this definition to this case, we find that seat covers were in fact manufactured, for the cars came out of the shop with seat covers where there were none in the shop when the cars were driven in." (Tr. p. 57.)

Apparently, the learned judge below relied on the cases cited in his opinion for his decision. Said cases implicitly assume the basic premise that a repairer is not a manufacturer and therefore not subject to the manufacturers' excise tax. It thus becomes important to determine the meaning of the term "repairer". In the leading case of *Clawson & Bals v. Harrison* (7 Cir. 1939), 108 F.2d 991, 994, the court, in finding that the making of new rods from used and discarded connecting rods was manufacture rather than repair, enunciated the following principle:

> "*Ordinarily a repairer furnishes labor and material to the owner of some article for the purpose of restoring the article to its normal condition.* The article remains the property of the one for whom the service is performed. If this taxpayer is a repairer it is a repairer of its own property, not for the purpose of restoring its own property for efficient use in the ordinary operations of the taxpayer's business, but for the purpose of preparing the property for sale in the trade. In the transactions between the taxpayer and its vendees the connecting rods, whether prepared from new forgings or from old connecting rods, are treated as newly and freshly produced automobile accessories. Neither taxpayer nor the trade recognizes that the finished connecting rods are repaired rods. *Looked at from the standpoint of production and distribution in the trade* the taxpayer is performing the function of a manufacturer rather than a repairer." (Emphasis supplied.)

In each of the other cases cited by the judge the same principle is applied with the same result under essentially similar facts. These cases, however, are clearly distinguishable on the facts from the case at bar and, although controlling in principle, should not be controlling in the result here. In each of the *Clawson & Bals* line of cases, the articles found to have been manufactured were articles which were produced and kept in stock for sale to the general market. The articles were articles of commerce, the production of which constituted the dominating feature of the process involved and formed the basis of the decisions.

Here, however, the seat cover is not an article of commerce. (Tr. p. 124.) It was not kept in stock for sale in the trade. (Tr. p. 108.) It was custom made (Tr. p. 120) and only after the car was brought in (Tr. p. 108). The dominant feature of the process in the case at bar, then, is the performance of labor and furnishing of material. The finding in the *Clawson & Bals* line of cases that the operation was manufacture and not repair, therefore, is clearly warranted by the facts. But not so here.

The trial court further held:

> "Under the statute here involved the tax attaches only when a manufactured part or accessory is sold by the manufacturer. We have held that seat covers are manufactured parts or accessories, and that these seat covers were sold is not disputed. Thus the only remaining question is whether plaintiff is the manufacturer liable for the tax. Where a customer brings in his own materials and has the seat covers made by the jobber, he in effect is buying the skill and labor of the jobber so that the transaction becomes one for work and labor. To be sure, a seat cover has been manufactured, but the customer is the manufacturer and not the jobber. Here title to the article throughout the process is retained by the customer. See: *In re Burkhead,* 106 F.Supp. 527 (Texas 1952). On the other hand, where the jobber supplies the material as well as his skill and labor and the customer pays for the seat covers at a price for completed and installed seat covers, the jobber is the manufacturer and is liable for the tax. In John J. Roche Co. v. Eaton, 14 F.2d 857 (D.C. Conn. 1926), the court held this latter type of operation to be for work and labor. How-

> ever, this case seems to have overlooked the question of who is the manufacturer." (Emphasis supplied.) (Tr. p. 58.)

This portion of the opinion discloses three errors of misinterpretation committed by the trial court below, which are as follows:

One. The trial court below seems to be of the opinion that the question of manufacturing was assumed in the case of *In Re Burkhead* (D.C. Texas 1952), 106 F.Supp. 527, and that the issue on appeal in said case was as to who the manufacturer was, whether the jobber or the customer. To the contrary, the question of manufacturing was not assumed in said case, but was directly in issue. The court there, considering certain exchange transactions involving pressure plate assemblies, states the issue as follows:

> "The Government assessed against him a tax liability under said statute on the above recited transactions in the principal sum of $10,341.26, and filed a claim for such alleged taxes, plus interest, together with some other small items of uncontested taxes, in this bankruptcy action. The trustee contested the bankrupt's liability for said sales taxes and the referee rejected entirely that part of the claim, on the theory that the bankrupt was not a manufacturer or producer selling automotive parts in the transactions aforesaid, but acted simply as a repair man. The Government was dissatisfied and presented its petition for review."

It was then held:

> "Any notion of a sale being latent in such course of business would be pointless under the

circumstances. It is more realistic, and likewise tenable, to stand on the premise that in law, as in practical business acceptation, the units sent in were constructively the same units received back with accretions and betterments incident to the reconditioning service, and that title throughout was retained by the customers."

And the court concluded:

". . . that the bankrupt in any event was bailee rather than owner of the units dealt with in his exchange transactions, and consequently he was not a manufacturer or producer selling such units so as to become liable for the tax claimed."

Two. The trial court in the Memorandum Opinion states:

"Where a customer brings in his own materials and has the seat covers made by the jobber, he in effect is buying the skill and labor of the jobber so that the transaction becomes one for work and labor. To be sure, a seat cover has been manufactured, but the customer is the manufacturer and not the jobber."

The first sentence correctly states the law, but the second is nowhere sanctioned in *In Re Burkhead or* any other case. Such a rule is contrary to the definition of a manufacturer as provided in 26 C.F.R. 316.4.

Three. The following statement of the trial court is also incorrect:

"On the other hand, where the jobber supplies the material as well as his skill and labor and the customer pays for the seat cover at a price for completed and installed seat covers, the jobber is the manufacturer and is liable for the tax."

What difference does it make who supplies the material? Either the jobber is a manufacturer or he is not. The mere fact that he furnishes material does not make him a manufacturer, and this proposition is sanctioned in *In Re Burkhead.*

The case of *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857, therefore, stands unimpaired as a legal precedent on the matter.

Finally, the trial court held:

> "Plaintiff claims that he is doing repair work. Use of the term 'repair' is deceiving in this area. Webster defines 'repair': 'To restore to a sound or good state after decay, injury, etc.' Whenever any component part or accessory of an automobile is put in serviceable condition, common parlance description is that the 'automobile has been repaired.' *Likewise, plaintiff here claims that the seats are being repaired. Broadly speaking (it) is not incorrect to maintain such a position for the reference is to the whole even though only a part thereof was fixed.* However, the word 'repair' in this context must have reference to seat covers and not seats. In other words, plaintiff must claim that the seat covers are being repaired. A seat cover is repaired only if a portion of it is redone and the basic seat cover is still intact. See: *Martin Tire Co. v. United States,* 130 F.Supp. 316 (Fla. 1955). Where the old seat cover is removed and a new one installed or where a new one is installed where none existed, the operation is not repair, but replacement or addition." (Tr. p. 59.) (Emphasis supplied.)

The court, it is seen, relies on two basic propositions for its decision: (1) The term "repair" must have

reference to the seat cover, since the unit looked to is the seat cover and not the seat. (2) The operation is not repair where there is replacement or addition.

We first consider the first proposition. Manifestly, the trial court below was of the opinion that judgment depended on which unit was to be looked to—the seat or the seat cover. It expressly admits in the Memorandum Opinion that it is not incorrect to maintain the position that the seats are being repaired; in other words, it is proper to look to the seat as the unit. Undoubtedly, too, the court before rendering its decision believed at the same time that the seat cover was also a proper unit which could be considered in determining whether the operation was repair or not. Thus, it had two choices, either of which, it believed, could be taken as the proper unit. As stated in Argument I, the courts are charged by the fundamental rule of construction to construe revenue statutes liberally in favor of the taxpayer and most strongly against the government. Applying said rule, the seat and not the seat cover is the proper unit looked to, since obviously the former is the more liberal of the two alternatives. The court below, however, elected to look to the seat cover as the unit. The writer submits that rules of construction have a purpose and are not to be lightly set aside.

It may be argued that the rule of construction does not apply in this instance, since the word "repair" and not "manufacture" is at issue and construction of the former is not construction of the statute. However, the word "repair" is essential in the case

at bar in determining the meaning of "manufacture". By defining "repair" we define the limits of the term "manufacture", so that construction of the former is construction of the latter. The rule should apply, therefore, if the "unit test" as proposed by the court below be accepted.

We come now to the second proposition set forth by the court. That the court below was of the opinion that replacement or addition negatives repair, seems to have been influenced by Mr. Dwight's cross-examination of appellant in the proceedings below. This appears in the Transcript of Proceedings (Tr. pp. 113-15):

> "Q. (by Mr. Dwight). Mr. Hirasuna, when a car is delivered in your shop, you stated that about 85 per cent of the cars delivered had a seat covering on them that you removed?
>
> A. Yes, sir.
>
> Mr. Kashiwa. Just a minute. You mean non-factory seat cover. Every car has a covering some time.
>
> Q. (by Mr. Dwight). Non-factory seat cover?
>
> A. Yes, sir.
>
> Q. Now, after you removed this non-factory seat covering, was there yet another covering on the seat, material on the seat?
>
> A. Well, I find occasionally there is about two covers on it, these ready-made covers.
>
> Q. I am talking about the condition of the cushion and the lazy back. Now, as it comes from the factory, is there a covering—is that factory covering on your lazy back and your cushion after you have removed this non-factory covering?
>
> A. Yes, sir.

Q. Now, the other 15 per cent of the cars that are delivered to your shop, do they have this factory-made covering on them?

A. Yes, sir.

Q. Do you do anything to that factory-made covering?

A. No, sir.

Q. That is, except vacuum it?

A. Vacuum it and clean it.

The Court. Speak a bit louder, please.

A. Yes, sir.

Q. (by Mr. Dwight). Your job is, then, to put a new and different covering on top of this factory-made covering, is that right?

A. Yes, sir.

Q. And this new and different covering, then, is usually your plastic material?

A. Usually.

Q. Sometimes it is leatherette, sometimes it is fibre?

A. Yes, sir.

Q. But you don't take the factory covering off of the seat?

A. Well, if there is any rips or some kind of damage I usually repair it and cover it. You see, if I take off the factory covers, it is going to be very hard for me to install it because of the cotton in there, it will be all separated from the frame of the cushion.

Q. So what you are dealing with, then, for instance, the front cushion, you are dealing with the front cushion as it came from the factory; you don't change the front cushion, you put a cover on top of it, is that right?

Mr. Kashiwa. Your Honor, that question is unintelligible, puts a cover on it.

The Court. I don't think it is. He can answer it.

Mr. Dwight. Read the question.

(Question read.)

The Court. Do you understand the question?

A. Yes, Your Honor.

The Court. Are you sure? If so, you can answer; if you don't understand it, just say so and he will rephrase it.

A. You mean why, why I had to cover it?

Q. (by Mr. Dwight). My question is not why you have to cover it. Do you put a separate cover over the factory seat without changing the factory seat?

A. Yes.

The Court. In other words, when you get through there are really two pieces of cloth over the padding and the springs?

A. Yes, sir.

The Court. One, the original factory covering and, second, the new one that you put on top of that?

A. Yes, sir."

But it is not true that replacement or addition is not repair. Replacement may be repair. *Fidelity Storage Corp. v. Burnet,* C.I.R. (C.A. Dist. Col. 1932), 58 F.2d 526, 528; *Libby & Blouin, Ltd. v. C.I.R.,* 4 B.T.A. 910, 914; *Westinghouse Electric & Mfg. Co. v. Hesser* (C.C.A. Ky. 1942), 13 F.2d 406, 410; *Micromatic Hone Corp. v. Mid-West Abrasive Co.* (D.C. Mich. 1948), 78 F.Supp. 641, 644, 645; *Eliott & Barry Engineering Co. v. Baker,* 114 S.W. 71, 73, 134 Mo. App. 95. And, further, addition may

be repair. See *Garland v. Samson* (C.C.A. 8, 1916), 237 F. 31. It is there stated:

"The word 'repair,' as defined by Webster's New International Dictionary, means:

'Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.; supply of loss; reparation; mending.'

With this meaning the word has been practically applied by the courts in the construction of statutes and contracts. (Citation of numerous cases follows.)

On the other hand, the word 'improvement' is defined by Webster's New International Dictionary as: 'A valuable *addition* or betterment, as a building, clearing, drain, fences, etc., on land.' The word 'improvement' is a broader word than 'repair,' but *includes the latter*. This word has been practically applied by the courts in accordance with this definition in Minneapolis Plumbing Co. v. Arcade Inv. Co., 124 Minn. 317, 145 N.W. 37; N.W. Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N.W. 964; Arnhold v. Klug, 97 Kan. 576, 155 Pac. 805; Parker v. Wulstein, 48 N.J.Eq. 94, 21 Atl. 623; Buttenbrock v. Miller (Ind.) 112 N.E. 771; Meyer v. City St. Improvement Co., 164 Cal. 645, 130 Pac. 215; South Park Commissioners v. Wood, 144 Pac. 1087; Walker v. Tillis, 188 Ala. 313, 66 South. 54, L.R.A. 1915A, 654; O'Neil v. Lyric Amusement Co. (Ark.) 178 S.W. 406; A. Leschen & Sons Rope Co. v. Moser (Tex.Civ.App.) 159 S.W. 1018; City of Roswell v. Bateman, 20 N.M. 77, 146 Pac. 950; In re Howard Laundry Co., 203 F. 445, 121 C.C.A. 555." (Emphasis supplied.)

The test, therefore, is not whether there is replacement or addition. To the contrary, it appears from the cases that there is no satisfactory test in determining whether a given operation is manufacture or repair. To be sure, none of the cases in the Clawson & Bals line have attempted to lay down a test or rule such as that proposed by the learned judge below. It is submitted that the primary inquiry is still whether the process is essentially one of production or whether it is for the purpose of restoring the article of another to its normal condition. See *Clawson & Bals v. Harrison* (C.C.A. 7, 1939), 108 F.2d 991. Furthermore, ". . . the question whether the process is essentially one of production or merely of repair is to be resolved by an overall view of taxpayer's activities . . ." *U. S. v. J. Leslie Morris Co.* (C.C.A. 9, 1942), 124 F.2d 371, 372. And the taxpayer's activities must be viewed from the "standpoint of production and distribution in the trade." *Clawson & Bals v. Harrison,* supra. These are the guides.

At this point, the facts become important. The writer therefore directs the attention of this Court to the entire testimony of appellant (Tr. pp. 87-129) and especially to the following (Tr. p. 126):

> "The Court. Yes. In other words, most of the cars that come to him are worn out with respect to the factory covers, but sometimes he gets brand new cars to have seat covers put on. Is that a fair statement?
>
> A. Yes, sir.
>
> Q. (by Mr. Kashiwa). Now, with relation to these factory covers which are worn out, would it

be advisable to remove those factory covers? What would happen if you removed that?

The Court. Which question do you want answered? One question at a time.

Mr. Kashiwa. Well, let's take the first one.

A. You mean just what you said right now?

Mr. Kashiwa. Well, I will rephrase it here.

Q. With relation to these cars where the factory cover shows cotton, you can see it from the top, now with relation to that type of condition what would happen if you removed that factory cover?

A. Well, if we removed the cover, we are going to have a difficult time to install the covers because it is just going to come off, to pieces.

Q. What will come off?

A. The measurements, the wadding, I mean the padding and everything. We do at times upon customer's request, but we charge extra for that because of the difficulties."

In analyzing the facts, it must be kept in mind that revenue statutes should be given a practical and workable construction (*Rullen v. Buscaglia* (C.C.A. Puerto Rico 1948), 168 F.2d 401, 403, cert. den. 335 U.S. 857, 69 S.Ct. 131; *Richard T. Green Co. v. City of Chelsea* (C.C.A. Mass. 1945), 149 F. 2d 927, 931, cert. den. 326 U.S. 741, 66 S.Ct. 54); and that in the construction of such statutes substance, not form, controls (*C.I.R. v. Strong Mfg. Co.* (C.C.A. 6, 1941), 124 F.2d 360, 364, reversed on other grounds *Helvering v. Strong Mfg. Co.,* 317 U.S. 102, 63 S.Ct. 103; *Sanborn v. C.I.R.* (C.C.A. 8, 1937), 88 F.2d 134, 137, cert. den. 301 U.S. 700, 57 S.Ct. 930). Useless acts are not re-

quired. See: *Rose, C.I.R. v. Haverty Furn. Co.* (C.C.A. 5, 1926), 15 F.2d 345, 346.

It is therefore submitted that the process of making seat covers in the case at bar, viewed in its entirety and from the standpoint of production and distribution in the trade, was essentially for the purpose of restoring the original condition of the seats and hence constituted repair and not manufacture. It has been so held in *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857. See also: *In Re Burkhead,* supra, and *Martin Tire Co. v. U.S.* (D.C. Fla. 1955), 130 F.Supp. 316.

IV.

APPELLANT'S LABOR FOR CHALKING, MARKING, CUTTING AND SEWING WAS AN INSTALLATION CHARGE.

"Section 316.8. Basis of tax on sales, generally. (a) The tax is imposed on the sale by the manufacturer of any of the articles enumerated in the regulations in this part. The provisions of law embody the rules for determining the sale price, which is the basis of the tax, except in cases covered by section 3441(b) (see section 316.15). In general, this should be the manufacturer's actual price at the point of distribution or sale. In determining the sale price, for tax purposes, there shall be included any charge incident to placing the article in condition packed ready for shipment. There shall be *excluded* (1) the amount of the tax, whether or not billed as a separate item, and (2) (subject to the provisions of section 316.12) transportation, delivery, insur-

ance, *installation,* or other charges (not required by the preceding sentence to be included)." 26 C.F.R. 316.8(a) (emphasis supplied). Plaintiff's Ex. "F".

The Transcript of Proceedings (Tr. p. 122) establishes that the price of the covers includes cost of labor and material and that the charge for labor is charge for installation.

"Q. (by Mr. Kashiwa). Now, with relation to the price of the covers you quoted, that includes the cost of the material, am I right, the cost of the material to you?

A. Yes, sir.

Q. And also all of the labor?

A. Yes, sir.

Q. The installation labor?

A. Everything.

Q. Now, roughly speaking, breaking that down, let's say for a $25 job, what per cent would you say is the cost of material?

A. I'd say about two-thirds.

Q. Two-thirds. And the other third is——

A. Labor.

Q. ——labor. Now, by labor you mean the labor used to initially mark the article, cut it, sew it and then put it on the car, am I right?

A. Yes.

Q. Do you also include the labor of taking the seats out of the car?

A. Yes, sir.

Q. All of that is included?

A. Yes, sir."

That the cost of labor is an installation charge is further seen in that every act in the chalking, mark-

ing, cutting, and sewing is performed with the intention of immediate installation. To illustrate, take the process of covering the cushion (Tr. p. 94):

"Q. . . . Now with relation to the covering of the seat and the lazy back, will you tell us exactly how it is done after the car arrives at your place of business?

A. You mean the cushion and the lazyback?

Q. Yes.

A. Everthing?

Q. Well, let's take the cushions first. You tell us exactly how it is done.

A. Well, we take the cushion out of the car and measure it. You see, the cloth is about 64 inches, the width is enough, so we measure the width of the cushion and cut it and we lay the cloth on top of the cushion and pin it on the corner and pull it tight. We pull it as tight as possible. We mark it around the edge where we are going to sew it.

Q. What do you mark it with?

A. We mark it with chalk. And we cut another piece of cloth which is called facing underneath here, in sections, you see, and we mark it here, try to take all the wrinkles off from the cloth, and we mark it and we cut it with the scissors, and we lay it on the machine and we sew a piping, that is a welt, a white welt, along the edge of the chalk, and we sew the facing and the seat cover together.

Q. Then what do you do after you are through sewing?

A. Well, I vacuum clean the cushion and see if there is any springs broken, and if there is we usually put a new spring in it, and we pad all

> the corners with wadding, thin cotton, you know, and we install it."

Every act in the process, then, is performed not with the intention of putting out the cover for sale in the general market, but with the idea of immediate installation. The charge for labor, being a charge for installation, must be excluded in determining the basis of the tax. What we have in the final analysis is a sale of material, or bare cloth only.

V.

APPELLANT'S SEAT COVER BEFORE INSTALLATION NOT A PRODUCT COMMONLY OR COMMERCIALLY KNOWN AS A "PART OR ACCESSORY".

Subsection (b) of 26 C.F.R. sec. 316.55 requires that an article, before it can be denominated a "part or accessory" must have reached such a stage of manufacture that it is *commonly or commercially* known as a part or accessory whether or not fitting operations are required in connection with installation.

The writer submits that the covers, after being cut and sewn but before installation, cannot be deemed at law to have reached such a stage of manufacture that they are commonly or commercially known as "parts or accessories". The uncontradicted testimony of appellant in the trial court below (see transcript) substantiates the writer's contention.

First of all, appellant testified that the covers before installation are not recognizable and cannot be sold on the market as such (Tr. p. 124):

"Q. Now, have you at any time seen covers of the type you make sold on the market as an auto part?

A. No, sir.

Q. Why couldn't it be sold on the market?

A. I think it cannot be, because when you compare two covers, a ready-made and our covers, our covers look—are really sloppy, you just can't make head or tails on them, because you just got to know how to install it. But ready-made covers, they have all the facilities, such as they have a rope or grommet tacked onto the facing cloth which you could tie it with a rope, you know, and they have springs that you could hook it onto the cushion, and they have instructions, they have a pin—they usually use pins on it, on the back of the covers."

Secondly, and at the same time, he further testified that the covers to the cushions and lazybacks are expertly cut and sewn to fit the particular cushion or lazyback, so that the installation of such covers demands the attention of a skilled and experienced person in the trade (Tr. p. 120):

"Cross-examination by Mr. Dwight:

Q. And when you have completely finished sewing you have a piece of cut and fitted and sewn material ready to be put on——

A. Yes, sir.

Q. ——to the cushion or lazyback?

A. Yes, sir.

Q. It is for all intents and purposes when you have reached that point, all that is left then is to pull it tight and to hook it on with your hog-rings and however else you stick it on?

A. Well, it couldn't be installed by an inexperienced man because it looks like a bag, a sack or bag. It is not—you just——

Q. However, it is, as far as you are concerned expertly cut to fit this particular cushion or lazyback?

A. Yes, sir.

Q. And it is made to fit the cushion. And actually, then, with experienced personnel it is pulled to fit the seat?

A. Yes. Well, we have——

Q. And connecting material, whether it is tacking or whether it is a hog-ring is put in to hold it onto the cushion or lazyback?

A. And there is a lot of tricks and know-how involved in it.

Mr. Dwight. No further questions."

Finally, the uncontradicted testimony is that the cover is not usable for any other car than that for which it was made (Tr. p. 121):

"Q. Now, this material which is sewn together whether it is for the cushion or for the lazyback, is that good for any other car?

A. No, sir.

Q. It is made for——

A. That particular cushion.

The Court. Well, just a minute, if it is made, for example, for a 1955 Chevrolet cushion, wouldn't it fit all of that model and that year?

A. Well, it will fit, but it won't fit evenly. What I mean is, I would be ashamed of it, to install another cover that is taken from another car pattern, because cushions are not all alike.

The Court. They do vary?

A. I have tried before, but it doesn't work. What I mean is, purely from the standpoint of a tailor-made cover.

The Court. Is that because of the way cushions are worn by the time they reach your shop?

A. Yes, sir.

The Court. Some are worn more than others and take different shapes?

A. Take a 250-pound man, really break the cushion of it. It is really a different size altogether."

It may be that a ready-made seat cover is a "part or accessory", but the covers made by appellant herein are clearly different. Besides the differences stated in appellant's testimony above, appellant's covers differ in the following respects: (1) Different designs of covers are made, which designs are designated by the customer. (Tr. p. 101.) (2) In most cars, the front and rear cushion and the front and rear lazyback are covered separately. (Tr. pp. 94-100.) (3) In General Motors cars, the front and rear cushion and the front and rear lazyback are detached before the covers are made. (Tr. pp. 110-111.) (4) The covers are never made to be kept in stock. (Tr. p. 108.)

On the basis of the foregoing, it is submitted that the covers made by appellant in the case at bar did not reach such a stage of manufacture that they were commonly or commercially known as "parts or accessories".

VI.

CONTRACTS FOR LABOR AND MATERIALS ARE DISTINGUISHED FROM CONTRACTS OF SALE AND ARE NOT WITHIN THE CONFINES OF THE REVENUE STATUTE.

In the case of *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857, 858, the court had before it for construction, section 900, title 9 of the Act of February 24, 1919. The relevant parts of said section read as follows:

> "That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> "(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> "(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof, except tractors, 5 per centum;
>
> "(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

As to said section, the court held:

> "It will not be questioned that a distinction exists between a contract of sale and one for work and materials. The distinction is not recent. It

was recognized long anterior to the passage of the act of 1919. I will not assume that Congress was ignorant of its existence, and that, in the use of language having definite and ascertained legal connotations, it intended to disregard them. The notion or theory that, because the statute applicable is a taxing statute, its language was destined for lay persual and devised for a lay interpretation, is a trifle overingenious. The law emanating from Congress is always addressed to all of the people. Rules of statutory construction do not vary in accordance with the assumed learning or intelligence of the class which in any given instance is specially affected by the legislation.

"I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction. While the line of demarcation between a contract of sale and one for services and material is often elusive, that is not a consideration which impugns the validity or the reality of the distinction.

"I therefore hold that the parts or accessories (assuming that they are such) were not sold by the plaintiff within the intendment of the statute. . . ."

The same section was reenacted in substantially the same form in the Revenue Act of 1939, as amended, and reads:

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum, except that on and after April 1, 1955, the rate shall be 5 per centum. A sale of an an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this section, be considered to be a sale of the chassis and of the body.

"(b) Other chassis and bodies, etc. Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and after April 1, 1955, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(c) Parts or accessories (other than tires and inner tubes and other than radio or television receiving sets) for any of the articles

> enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1955, the rate shall be 5 per centum." 26 U.S.C.A. section 3403.

This section was interpreted along the same line as in the *John J. Roche Co.* case, supra, in *Johnnie & Mack, Inc. v. U. S.* (D.C. Florida 1954), 123 F. Supp. 400, wherein the court held: "The sales of seat covers are sales of labor and materials and are not sales of seat covers as accessories," "regardless of whether the purchaser is an individual automobile owner or is a new or used car dealer."

The District Courts do not seem to be alone in drawing the distinction. It appears that the Treasury regulations also make the distinction. In 26 C.F.R. 316.5, it is provided:

> "Section 316.5. When tax attaches. (a) In general the tax attaches when the title to the article sold passes from the manufacturer to a purchaser.
>
> "(b) When title passes is dependent upon the intention of the parties as gathered from the *contract of sale* and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the *sale* is made govern in determining when title passes. Generally, title passes upon delivery of the article to the purchaser or to a carrier for the purchaser." (Emphasis supplied.)

Two things must be noted in the regulation above: (1) The reference is to the law of sales. (2) No provision is made as to when title passes in a contract

for labor and materials. These points are material and essential for the reason that, at common law and under the Uniform Sales Act, the great weight of authority holds, as a matter of law, that contracts for labor and materials are not contracts of sale. The rule is well stated in *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men* (Sup. Ct. Wash. 1949), 209 P.2d 358, 361, 34 Wash. 2d 553. The court there held as follows:

> "The common law recognized the distinction between contracts to sell and contracts for work, labor and materials. Some of the courts and text writers are of the opinion that section 5 of the Uniform Sales Act, Rem. Rev. Stat. sec. 5836-5, which gives legal effect to contracts for 'future goods' as contracts to sell, eliminates that distinction. The case authority on either side of this proposition is scant and divided. See Annotation, 111 A.L.R. 341. However, we believe it to be the better rule that the Act does not purport to include within its purview contracts for work, labor and materials. In a sound analytical opinion, the Utah court sets forth the reasons for this rule in the case of Sidney Stevens Implement Co. v. Hintze, 92 Utah 264, 67 P.2d 632, 635, 111 A.L.R. 331, wherein a contract to construct a trailer especially for a traveling salesman, which was not readily salable to others in the manufacturer's regular course of business, was held to be a contract for work, labor and materials, and not a contract to sell. In construing secs. 5, supra, and 76 (defining future goods) of the Act the court said: '. . . If, as a matter of law, a contract is one for work, labor and materials, it is not a contract of sale and consequently would not come within

the definitions contained in secs. 5 and 76. These two sections, therefore, do not contain any new rule expanding the law of sales to include within its purview a transaction which is not a "contract to sell," nor does the act contain any definition of a "contract to sell" which enlarges its scope so as to eliminate the distinction, existing before the creation of the Uniform Sales Act, between a contract of sale and a contract for work, labor, and materials. We fail to see, therefore, how sections 5 and 76 of the Sales Act can apply to a contract involving, not a "contract to sell," but a contract involving the manufacture of something especially for the buyer and not readily salable to others in the manufacturer's regular course of business, if such a contract cannot be said to be a contract to sell when made, but must be considered a contract for work, labor, and materials.'

"As the reasoning of the Utah court indicates, there must be a 'sale' or a 'contract to sell' before the Act will apply to a given transaction. It is not the purpose of the Uniform Sales Act to bring within its scope every transaction involving a change in possession or ownership of chattels. The Act itself, in sec. 73, Rem. Rev. Stat. sec. 5836-73, recognizes that there are cases which are not provided for in the Act and stipulates that such cases shall be governed by the general principles of law and equity. Sound reasoning supports the rule that a contract for work, labor and materials is just such a case and is therefore not within the confines of the Act."

See: *Sidney Stevens Implement Co. v. Hintze,* 67 P.2d 632, 635, 92 Utah 264. See also: *Rino v. State-*

wide Plumbing & Heating Co., 262 P.2d 1003, 1005, 74 Ida. 374; *Foley Corp. v. Dove,* 101 A.2d 841, 842, (Dist. of Columbia); *Perlmutter v. Beth David Hospital,* 123 N.E.2d 792, 793, 308 N.Y. 100; *Racklin-Fagin Const. Corp. v. Villar,* 281 N.Y.S. 426, 427, 156 Misc. 220; *Carlson, Holmes & Bromstad v. M. I. Stewart & Co.,* 264 N.Y.S. 277, 279, 147 Misc. 607, affd. 283 N.Y.S. 430, 246 App. Div. 522; *United Iron Works v. Standard Brass Casting Co.,* 231 P. 567, 568-9, 69 Cal. App. 384. See also: 77 C.J.S. sec. 2, P. 584, "Sales". The reference to the law of sales, then, indicates that the Department of Treasury in issuing said regulation could not have ignored the distinction between contracts of sale and contracts for labor and materials; and the omission of contracts of the latter type from the provisions of the regulation must be deemed a recognition of the fact that such contracts for labor and materials do not come within the purview of the revenue statute in question here. This seems to be conclusive in view of 26 C.F.R. 316.8, which provides:

> "Section 316.8. Basis of tax on sales, generally. (a) The tax is imposed *on the sale* by the manufacturer of any of the articles enumerated in the regulations in this part." (Emphasis supplied.)

And the term "sale" is defined in 26 C.F.R. 316.1(f) as "an agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or other things." This is substantially the same definition given to the term "sale of goods" in

Section 1 (2) in the Uniform Sales Act. The conclusion is obvious in view of *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men,* supra, and the cases following:

The following must be kept in mind in considering the Treasury regulations: First, a Treasury regulation consistent with the statute has the force and effect of law. See: 26 U.S.C.A. section 3450; *Maryland Casualty Co. v. U. S.,* 251 U.S. 342, 349, 40 S.Ct. 155, 157; *Pacific Nat. Bank v. C. I. R.* (C.C.A. 9 1939), 91 F.2d 103, 105; *Crocker v. Lucas* (C.C.A. 9 1930), 37 F.2d 275, 277; *Douglas County Light & Water Co. v. C. I. R.* (C.C.A. 9 1930), 43 F.2d 904, 905; *Commissioner v. Van Vorst* (C.C.A. 9 1932), 59 F.2d 677, 679; *U. S. v. Public Service Co. of Colorado* (C.C.A. 10 1944), 143 F.2d 79, 81; *Williams v. C. I. R.* (C.C.A. 8 1930), 44 F.2d 467, 468. And, secondly, words and phrases having a technical meaning are construed according to their technical sense. See: *Jones v. Magruder* (D.C. Md. 1941), 42 F.S. 193, 197; *Hines v. Mikell* (C.C.A. 4 1919), 258 F. 28, cert. den.; *Mikell v. Hines,* 250 U.S. 645, 39 S.Ct. 494; *Barber v. Gonsales,* 347 U.S. 637, 641, 74 S.Ct. 822. See also: Sutherland, Statutes & Statutory Construction, 3rd ed., Callaghan & Co., Chicago, 1943, V.III (sec. 5304), V.II (sec. 4007).

For State decisions applying the distinction to State revenue statutes, see: *Samper v. Indiana Dept. of State Revenue,* 106 N.E.2d 797, 231 Ind. 26; *Gross Income Tax Div. of State v. W. B. Conkey Co.,* 90 N.E. 2d 805, 228 Ind. 352; *Singing River Tire Shop v. Stone,* 21 So.2d 580 (not reported in state reports).

The test in the law of sales as to whether a particular transaction is a contract of sale or a contract for labor and materials is stated in 77 C.J.S. section 2, "Sales", at page 585:

> "Whether a contract is one for the sale of goods, or for work and labor to be rendered may depend on whether the primary intent is merely to provide for the delivery of goods, or whether the essential consideration is work and labor to be performed at the employer's instance and for his use rather than for the producer's benefit. The distinction has been made that, if the property is not such as the seller usually has on hand for sale and in existence at the time of the sale, but is made specially for the buyer and on his special order, the contract is one for work and labor and not of sale; but that if the property ordered is exactly such as the seller makes and keeps on hand for sale to anyone, and no change or modification of it is made at the buyer's request, it is a contract of sale, even though it may be entirely made after, and in consequence of, the buyer's order for it."

See also: *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men,* supra, and cases following. See also: *Schroeder v. Cedar Rapids Lodge No. 304,* 49 N.W.2d 380, 242 Ia. 1297; *Adams v. Cohen,* 136 N.E. 183, 242 Mass. 17; *Bond v. Bourk,* 129 P. 223, 54 Colo. 51; *Goddard v. Binney,* 115 Mass. 450, 15 Am. Rep. 112; *Mixer v. Howarth,* 21 Pick. 205, 32 Am. Dec. 256.

That the sales of seat covers in the case at bar come within the four corners of the rule of test stated above,

is attested to by the cases cited, supra, and confirmed by *John J. Roche Co. v. Eaton* and *Johnnie & Mack, Inc. v. U. S.*

VII.

DOUBT MUST BE RESOLVED IN FAVOR OF APPELLANT.

The conclusion seems to be inescapable that appellant, in the case at bar, is not subject to tax, in that he was not a "manufacturer" and did not sell "parts or accessories" within the intendment of the statute. If, however, all prior arguments for some reason should be rejected, the writer contends that ultimately this case must be disposed of in accordance with the fundamental and well-settled rule of construction that all doubts must be resolved in favor of taxpayers. (The rule is stated and citations given in Argument I of this brief.)

That there exists a real and substantial doubt in the construction of the statute here in question is evidenced by the manifest confusion and instability of thinking of the Bureau itself, a body of expert men in the field of taxation. It was seen that the published rulings prior to August 18, 1952, logically lead to the conclusion that the sale of seat covers in the case at bar is not subject to tax, regardless of whether the sale is to individual automobile owners or to new or used car dealers. On August 18, 1952, however, the Bureau issued a public ruling reversing the trend of prior published rulings. Said public ruling refers to certain private rulings, the existence, number, time of

issuance, and contents of which, it may be noted incidentally, is nowhere in evidence in the proceedings below and which still remain a mystery, as stated previously. These private rulings, according to the published ruling of August 18, 1952, provided that sales of seat covers to individual automobile owners were not subject to tax, while those to new or used car dealers were subject to tax. Apparently, at this time and contrary to prior published rulings, the Bureau was of the opinion that there was a distinction between individual owners and new or used car dealers based on consumption. (The word "consumption" appears nowhere in the statute or regulations.) This distinction was discarded, and sales of seat covers to new or used car dealers, as well as those to individual automobile owners, were made subject to tax in said published ruling of August 18, 1952. Therefore, the thought process of the Bureau ran along the following lines: (1) Sales of seat covers specially made are not taxable, regardless of whether the purchaser is an individual owner or a new or used car dealer. (2) Sales of seat covers specially made and sold to individual owners are not taxable, while those to new or used car dealers are taxable. (3) Sales of seat covers specially made are taxable, nevertheless, regardless of whether the purchaser is a new or used car dealer. Certainly, this is confusion and instability of thought. The meaning of words do not change in such a short span of time. What better evidence is there of a real and substantial doubt, than the confusion and instability of thinking of an expert body of men?

It is respectfully submitted, therefore, that this court has no alternative, if it rejects all prior arguments, but to apply the rule and find for the appellant. The rule must not be reduced to ashes, to meaningless verbiage. It is the only beacon when the legal mind is without the guide of precedence and becomes enshrouded in doubt.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court below be reversed by this court and an appropriate order entered in conformity with this decision.

Dated, Honolulu, Hawaii,
March 17, 1956.

Respectfully submitted,
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